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IN THE

Supreme Court of the United States

October Term, 1964

No. 546

ROSARIO MOGAVERO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Rosario Mogavero, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 31, 1964, which reversed for a new trial a judgment of the United States District Court for the Southern District of New York, convicting petitioner and ten co-defendants, upon a jury verdict, under an indictment charging conspiracy to violate the Federal narcotics laws (21 U.S.C. §§ 173, 174).

Opinion Below.

The opinion of the Court of Appeals is not yet reported, but is printed as Appendix A, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1964 (Appendix B, *infra*). On August 24, 1964, an order extending the time for filing this petition to and including September 29, 1964 was signed by Mr. Justice Goldberg (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether, in a prosecution for conspiracy to violate the Federal narcotics law (21 U.S.C. §§ 173, 174), where prosecution is barred by limitations as respects the period prior to August 15, 1957, the requisite element of knowledge, on the part of the defendant, of the unlawful importation of the narcotics dealt in may be established (a) by proof of such knowledge on his part solely with respect to other narcotics previously dealt in years prior to the crucial limitations date of August 15, 1957, or (b) by the imputation to the defendant of the knowledge of a co-conspirator, or (c) by hearsay declarations of a co-conspirator.

2. Whether in such a prosecution for conspiracy, undisputed evidence of the defendant's continuous incarceration in a state prison commencing more than three and one-half years prior to the crucial limitations date of August 15, 1957, and continuing throughout the balance of the proven duration of the conspiracy, operates to terminate the presumption of the defendant's continued membership in the conspiracy which might otherwise be applicable, and re-

quires the Government to come forward with independent evidence of the defendant's continuance in the conspiracy.

3. Whether in such a prosecution for conspiracy, it is error for the District Court to permit the jury to determine the issue whether the defendant continued as a party to the conspiracy, after his incarceration in state prison, on the basis of the hearsay declarations of a co-conspirator made subsequent to his incarceration, instead of on the basis solely of independent evidence.

4. Where the key Government witness' prior inconsistent statements have been recorded on tape and also stenographically transcribed, whether 18 U.S.C. § 3500 entitles defense counsel to have made available to him the tape recording as well as the stenographic transcript and to use the tape recording at the trial for purposes of cross-examination.

Statutory Provisions Involved

The statutory provisions involved are 21 U.S.C. §§ 173 and 174, and 18 U.S.C. §§ 371, 3282 and 3500 (e)(2). They are set out in Appendix D, *infra*.

Statement of the Case

The one-count indictment in this case charged petitioner and nineteen other defendants, together with certain co-conspirators not named as defendants, with a single continuous conspiracy to unlawfully and knowingly import and deal in unlawfully imported narcotics, in violation of 21 U.S.C. §§ 173, 174, commencing about January 1950 and continuing to the date of the filing of the indictment. The indictment was returned on August 15, 1962, and the con-

trolling five-year statute of limitations (18 U.S.C. § 3282) barred prosecution as to the period prior to August 15, 1957.

As respects the petitioner, Rosario Mogavero, the evidence undisputedly showed that he was continuously incarcerated in a New York State prison on a conviction on a separate charge having no relation to narcotics, from December 14, 1953 to April 28, 1960 (R. 2649-50).* The proven terminal date of the conspiracy was early 1959 (see App. A, *infra*, p. 3a).

The only evidence offered to show that petitioner was a party to the charged conspiracy consisted of the testimony of a single witness, Salvatore Rinaldo, and, except for certain hearsay declarations of a co-conspirator (hereinafter discussed), related only to the period prior to petitioner's imprisonment in December 1953. Rinaldo's testimony as to petitioner was completely uncorroborated.

According to that testimony, petitioner and Carmine Locascio, a co-defendant at the trial, arranged with Rinaldo to make a trip to Italy on their behalf in December 1950 to deliver a certain large sum of money to a certain individual in Italy, and to take back two trunks which contained concealed heroin. Upon his return from that trip, in March 1961, Rinaldo turned over the two trunks to petitioner and Locascio. Shortly thereafter he agreed to pick up and deliver heroin for them and did so periodically for the following 2½ years. Rinaldo testified that for the greater portion of that period petitioner's brother, Joseph Mogavero (a co-defendant not on trial), acted as "plant man" (providing storage for the heroin) in the operation.

* "R" references are to pages of the Record on Appeal.

Some time in December 1953, prior to petitioner's going to jail, Rinaldo, according to his testimony (R. 269-70) met with the two Mogavero brothers and Locascio, and petitioner at that time made certain statements which Rinaldo described as including the following (making it clear elsewhere in his testimony that he was not repeating the precise words used, R. 40-43):

> "Saro Mogavero [petitioner] told me that in the future I was to take orders from Joe Mogavero and Carmine Locascio, and to act just like I had acted before; just that I would be taking orders from Joe Mogavero, but they would be just like coming from him * * * ".

That was the extent of the conversation, with the exception of certain additional discussion which concerned, Rinaldo testified, "could I find a plant, a new plant, for the goods or junk, *if* we got any more." * It was clear that the parties had at that time disposed of all the "goods or junk" on hand (R. 270 *et seq.*).

As regards the period subsequent to this conversation and throughout the remainder of the alleged conspiracy as testified to by Rinaldo, there was not an iota of independent evidence of petitioner's own words or deeds adduced by the Government to show that he continued his participation in the conspiracy. All that the Government offered in this regard consisted merely of testimony by the witness Rinaldo concerning certain hearsay declarations allegedly made to him by Joseph Mogavero, with reference to petitioner, years after the latter went to prison and outside of the latter's presence.

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* Emphasis throughout is supplied unless otherwise indicated.

The remainder of Rinaldo's testimony concerned the period from December 1953 to early 1959, and related to narcotics operations in which Rinaldo participated with Joseph Mogavero and others. The evidence as to the conspiracy charged terminated upon the severance of the relationship between Rinaldo and Joseph Mogavero in early 1959 (R. 597-99).

The hearsay declarations to which Rinaldo testified relating to petitioner consisted of certain conversations between Rinaldo and Joseph Mogavero in 1957 and 1959 in substance as follows:

(a) In June or July of 1957, Joseph Mogavero told Rinaldo "that he was getting desperate, that he had been using a lot of his brother's money, and he was anxious to get rid of his goods to get moving again" (R. 498).

(b) In November 1957, Joseph Mogavero told Rinaldo "that he had seen his brother, Saro Mogavero, and that his brother told him to get rid of the darn thing at any price, that it was no good laying around" (R. 503-4).

(c) In February or March 1959 Rinaldo demanded, from Joseph Mogavero, payment of his share as a partner of the proceeds of their operation. Joseph Mogavero told him he was "under a misapprehension" and would receive only the sum of $1,500, computed at the rate of $200 per kilogram. A discussion followed in which Joseph Mogavero said, in answer to a question by Rinaldo, that "my brother will go along with anything I suggest or say" (R. 597-99).

On redirect examination Rinaldo further testified, apparently referring to the same conversation, that "I had been partners with Joseph Mogavero, and he told me that

his brother, Saro Mogavero, told him to chase me" (R. 1875).

There was no admissible testimony by Rinaldo, or any other witness, with regard to any further activity on the part of Joseph Mogavero or any of the other defendants below subsequent to the foregoing conversation of early 1959.

Rinaldo was arrested on October 21, 1960 in connection with his activities as a co-conspirator in a separate narcotics operation on which he had embarked in July 1959 (R. 1005-06, 1329-30). Shortly after his arrest, Rinaldo agreed to cooperate with the authorities and over the following three months gave statements totalling approximately 575 pages to Federal and State authorities, exclusive of other statements embodied in a number of Federal narcotics agents' reports. The Government turned over copies of such statements to defense counsel in accordance with 18 U.S.C. § 3500.

At several points in his testimony at the trial, Rinaldo squarely affirmed the truth of his prior statements to the authorities; those statements thus became substantive evidence at the trial and the Court of Appeals so held, although the trial court had refused to so charge the jury (App. A, pp. 26a-27a).

It was undisputed that there was not a single mention, in any of Rinaldo's prior lengthy statements, of his alleged December 1953 conversation with petitioner or of his alleged 1957 and 1959 conversations with Joseph Mogavero in which the latter was supposed to have made certain references to petitioner (R. 1841-42).

But beyond that, it is further undisputed that included in Rinaldo's statements to the authorities, the truth of which he affirmed in his testimony, were unequivocal answers to questions put by the authorities which affirmatively establish that petitioner withdrew from the alleged conspiracy when he went to jail in December 1953 and that he at no time thereafter continued or renewed any association therewith.

In his initial lengthy statement to the authorities given on October 23-24, 1960, Rinaldo squarely stated that petitioner was no longer a party to the alleged conspiracy after he went to jail. He was thus questioned about his associates at the time that he made a certain trip to Italy (in the spring of 1956 according to his testimony), and he was specifically asked whether at that time petitioner (referred to as "Sario") was "still in it". The question and his answer were as follows (R. 1895, 1899):

> "Q. Who were you working with then? Was Sario still in it? A. No, he was in jail then."

In answer to other questions, Rinaldo further stated that there were "three partners" in the operation at that time —Joseph Mogavero, Locascio and John Caneba; that John Caneba had a "partner on the other side" in the person of his *brother* Hugo; but that Locascio and Joseph Mogavero "here had no partners" (R. 1898-1900). At another point in the same statement, Rinaldo also stated that he went to work for Joseph Mogavero in the fall or winter of 1955 when the latter "split up with Locascio"; and that Joseph Mogavero did not have "any partner then" but "was all by himself" (R. 1345-48).

Furthermore, in his testimony on cross examination, when questioned about the new arrangement into which he entered with Joseph Mogavero and the defendant Loiacano in the summer of 1958, he gave the following answers (R. 1292):

> "Q. Who was in the operation? A. Joseph Mogavero, Puggi Loiacano and I were partners in this deal.
>
> Q. In this deal you three were partners? A. Yes, sir.
>
> Q. Just you three alone? A. Yes, sir."

Rinaldo also affirmed the truth of testimony which he had given as a witness at a trial in November 1961 relating to his separate and later narcotics activities. At that earlier trial Rinaldo stated that in 1953 Joseph Mogavero and Locascio (the latter referred to by Rinaldo as "Willie Brown") purchased a new 1953 Oldsmobile for Rinaldo; that Rinaldo was working for those two at the time, selling narcotics; that Rinaldo had made a trip to Europe for them in 1954 or 1955, and had been working for them about two or three years prior to that time; and that he could not remember whether he had been engaged in the narcotics business with any one else prior to that time (R. 1362-64; 1374-75, 1379-81).

Following his arrest in the fall of 1960 on narcotics charges not related to this case, Rinaldo was convicted in 1961 on his plea of guilty to State indictments charging illegal possession of narcotics and conspiracy to illegally sell narcotics. Sentence on such plea of guilty was deferred until April 1963 when Rinaldo was sentenced to a term of imprisonment of up to 22 years, the execution of the sen-

tence being, however, suspended, and Rinaldo being placed on probation after a representative of the United States Attorney's Office recommended that that court exercise leniency on the basis of Rinaldo's cooperation with the Federal authorities (R. 34, 1464, 1572, 1576). Rinaldo was never charged with any federal offense.

Further facts are stated in the appropriate discussion, *infra*.

Reasons for Granting the Writ

1. Lack of proof of the requisite element of knowledge of unlawful importation.

Highly important questions, of first impression in this Court, are here presented as to the proper standards of proof of the essential element of knowledge of unlawful importation, in prosecutions for conspiracy to violate the Federal narcotics laws (21 U.S.C. §§ 173, 174).

While ordering a new trial on other grounds, the Court of Appeals gave no consideration in its opinion to petitioner's contentions that there was an absence of legally sufficient evidence to establish the element of knowledge on his part of the unlawful importation of the narcotics dealt in during the period not barred by limitations (i.e., after August 15, 1957), and that the Trial Court also erred in refusing to instruct the jury that it was essential, in order to convict, to find the requisite knowledge as of that period and that such a finding could not be made on the basis of the hearsay declarations of a co-conspirator.

By its terms, 21 U.S.C. § 174 makes it a crime only to "knowingly" import narcotics contrary to law, or to deal

in "any *such* narcotic drug after being imported or brought in, *knowing* the *same* to have been imported or brought into the United States contrary to law", or to conspire "to commit any of such acts".

Thus, "each of the substantive offenses under Section 174 requires proof of specific knowledge by the defendant that the heroin was illegally imported", and "the same specific knowledge is also an essential element of a conspiracy to commit these substantive offenses". *Hernandez* v. *United States*, 300 F. 2d 114, 120 (9th Cir. 1962); *United States* v. *Hernandez*, 290 F. 2d 86, 89 (2d Cir. 1961); *United States* v. *Jones*, 308 F. 2d 26 (2d Cir. 1962). The element of knowledge of the illegal importation provides the essential basis for the exercise of Federal jurisdiction (*Hernandez* v. *United States, supra*, 300 F. 2d at 121), there being no Federal jurisdiction over the buying and selling of narcotics *per se*. *Cf. Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

Section 174 further provides that even in the absence of direct proof of knowledge, conviction is authorized where "the defendant is shown to have or to have had possession of the narcotic drug . . . unless the defendant explains the possession to the satisfaction of the jury." The statute thus applies a rebuttable presumption that possession of narcotics carries with it knowledge of their unlawful importation. *Hernandez* v. *United States, supra*, 300 F. 2d at 120-121.

As noted above, the indictment in this case having been returned on August 15, 1962, prosecution could be maintained only for acts committed from and after August 15, 1957. It was consequently incumbent upon the Government

to establish each of the essential elements of the offense as against petitioner *with respect to the period after August 15, 1957*, including the element of his knowledge of the illegal importation, or possession, of the particular narcotic drugs illegally imported or dealt in subsequent to that date. There was a complete absence of legally sufficient evidence to establish as against petitioner the requisite element of such knowledge or possession as respects any of the narcotics allegedly dealt in during the period not barred by limitations.

As shown above, petitioner was continuously incarcerated in a New York State prison from December 14, 1953 to April 28, 1960. The last contact between Rinaldo, the Government's sole witness against petitioner, and petitioner himself (except for a casual exchange of greetings at a funeral) occurred some time in December 1953, shortly prior to petitioner's going to jail. The evidence showed that all the narcotics on hand had been disposed of prior to petitioner's going to jail (see *supra* p. 5). Except for certain hearsay declarations of a co-conspirator which were themselves of doubtful import (see *supra* pp. 6-7), there was no evidence whatever to show that petitioner had any part in, or knowledge of, any of the subsequent activities of the alleged co-conspirators, or that he had actual or constructive possession, or knowledge of the unlawful importation, of any of the narcotics dealt in during the period subsequent to December 1953.

All that the Government proved by competent evidence was that petitioner had had the requisite knowledge and possession with respect to the drugs dealt in prior to his incarceration in December 1953. That, however, did not

satisfy the Government's burden of proof. Section 174 of 21 U.S.C. thus makes it clear that it is intended to apply only to the knowing illegal importation of particular narcotic drugs and to dealings in such drugs after they have been imported, "knowing *the same* to have been imported . . . contrary to law". The provision of that section with respect to possession also makes it clear that the element of knowledge—or the alternative of possession—must be established with respect to the particular narcotics for which the defendant is "on trial"—namely, the narcotics involved in the period not barred by limitations. That provision further requires proof of "possession of *the* narcotic drug." Cf. *United States* v. *Jones*, 308 F. 2d 26, 33 (2d Cir. 1962).

Just as a charge of aiding and abetting the commission of the substantive offense under the facts of this case would require proof of the element of knowledge or possession with respect to the period not barred by limitations (*cf. United States* v. *Jones*, *supra*), so proof of knowledge or possession with respect to the same period is requisite in a prosecution such as this for conspiracy to commit such offense. *Cf. Hernandez* v. *United States*, *supra*, 300 F. 2d at 120.

While the indictment here charged a conspiracy both to unlawfully *import* narcotics, and to *deal in* narcotics after their unlawful importation, it was clear from the evidence that any conspiracy to import, and any overt acts in furtherance thereof, had been completed in about mid-1956, long before August 15, 1957. Conviction could accordingly not be had for a conspiracy to import. Cf. *Brolan* v. *United States*, 236 U.S. 216, 217 (1915). Indeed, the instant case

was tried and argued to the Court of Appeals on the theory of a conspiracy to *deal in* illegally imported heroin, with knowledge of such prior importation, in violation of the *latter* portion of Section 174 (see Gov't Brief in Court of Appeals, pp. 6, 32).

Particularly as respects a conspiracy to deal in unlawfully imported narcotics, the requirement of section 174 is clear that there must be proof of dealings in "any such [unlawfully imported] narcotic drug *after being* imported . . . knowing the same to *have been* imported . . . contrary to law". There must be proven "knowledge of such *previous*, illegal importation". See *Brolan* v. *United States*, *supra*, 236 U.S. at 217; see also *Mack* v. *United States*, 326 F. 2d 481, 483 (8th Cir., 1964). There was no basis for convicting petitioner of conspiracy to deal in the narcotics imported *prior* to his incarceration in December 1953, since the evidence showed that any such narcotics were completely disposed of long prior to August 15, 1957. There was likewise no basis for convicting petitioner of conspiracy to deal in narcotics imported after December 1953 since there was no competent evidence to show that, *after* such unlawful importation, petitioner acquired knowledge of that fact and, as already noted, there was certainly no such evidence as of the period subsequent to August 15, 1957.

The Court of Appeals apparently accepted without question the Government's bald statement in its brief before that court (p. 93), without citation of authority, that "the law requires no more" than a mere showing that petitioner had knowledge of the unlawful importation of narcotics "when he entered the conspiracy"—more than seven years prior to the crucial limitations date of August 15, 1957.

That position, however, ignores the requirement that each essential element of the crime charged must be established as of the period not barred by limitations.

Further, insofar as the Government may be relying on some kind of presumption that knowledge of unlawful importation of previously dealt in narcotics, once shown to exist, may be presumed to continue indefinitely thereafter and to encompass as well *other* narcotics subsequently acquired and dealt in, there is no authority to support any such unrealistic and unreasonable presumption. This Court has indeed made it clear that it will not sanction the application of any "rigid presumption . . . without regard to its reasonableness in the particular case". *Maggio* v. *Zeitz*, 333 U.S. 56, 65 (1948). It is certainly illogical and unreasonable, and in disregard of the jurisdictional requirements of Section 174, to presume knowledge as to narcotics dealt in by co-conspirators during the period barred by limitations, as a matter of law, from proof of knowledge as to *other* narcotics dealt in during the period barred by limitations.

The effectuation of the object of Congress in requiring the additional element of knowledge of unlawful importation in narcotics conspiracies has been held to preclude the application of the usual rules governing conspiracies generally to the element of knowledge in a narcotics conspiracy. It has thus been held that in a narcotics conspiracy the requisite element of knowledge, or possession, must be established on the part of each defendant sought to be charged with criminal liability, and that the knowledge or possession of one co-conspirator may not be imputed to another merely on the basis of their relation as

co-conspirators. *Hernandez* v. *United States*, *supra*, 300 F. 2d 114; *United States* v. *Hernandez*, *supra*, 290 F. 2d 86, 90; *cf. United States* v. *Jones*, *supra*, 308 F. 2d 26.

It is the added requirement of knowledge or possession which differentiates a conspiracy to violate the Federal narcotics laws under 21 U.S.C. § 174, from the general type of conspiracy to violate Federal law under 18 U.S.C. § 371. Just as the requisite proof of that essential jurisdictional element may not be supplied by reliance on the usual conspiracy presumption that each conspirator is chargeable with the acts of his co-conspirators in furtherance of the conspiracy, so that element may likewise not be supplied by reliance on the general conspiracy principle of presumption of continuance of the conspiracy.

Moreover, what the courts below have done is erroneously to apply, not a "presumption of fact"—which would permit the jury to find knowledge in the limitations period as an inference from proof of knowledge in the earlier limitations barred period—but a rigid presumption of law. See *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 65-6.

The Trial Court thus refused to instruct the jury, as requested by petitioner's counsel, that it was requisite for the Government to establish the element of knowledge of unlawful importation or possession of narcotic drugs on petitioner's part with relation to narcotics dealt in on or after August 15, 1957 (R. 3284-5), and charged the jury, instead, that it would be sufficient for them to find that petitioner had the requisite knowledge or possession at any time, and with respect to any narcotics dealt in during the period of the conspiracy, whether before or after August 15, 1957 (R. 3215, 3217, 3219, 3223-4).

The only purported evidence adduced by the Government to show the requisite knowledge or possession on petitioner's part with respect to the period after August 15, 1957 (apart from evidence of possession by co-conspirators, which could not be imputed to petitioner *qua* co-conspirator) consisted of the hearsay declarations of the co-conspirator Joseph Mogavero made in 1957 and 1959 (see *supra*, pp. 6-7). It is clear, however, that such hearsay declarations could in no event serve as legally sufficient evidence for the purpose of establishing an essential element of the crime here charged.

It is thus well settled that the participation of any particular defendant in a conspiracy cannot be established by resort to the declarations of a co-conspirator; "independent evidence" of the defendant's "own words and deeds", without regard to the hearsay declarations of any co-conspirator, is requisite for that purpose. *United States* v. *Bentvena*, 319 F. 2d 916, 948-9 (2d Cir. 1963); *Glasser* v. *United States*, 315 U.S. 60, 74-5 (1941). Since a defendant's participation in a conspiracy to violate Section 174 can be established only by proving each element constituting that crime, and since possession or knowledge of unlawful importation is a requisite element of the crime, it necessarily follows that that element of the crime must likewise be established by "independent evidence".

The requirement of independent proof to establish the element of knowledge or possession is implicit in the pertinent decisions. Thus, in *Harris* v. *United States*, 359 U.S. 19, 23-4 (1959) this Court used the term "direct evidence" to characterize the proof necessary to establish the element of possession.

The Trial Court, however, indeed compounded its error by permitting the jury, over petitioner's objection, to find the requisite elements of knowledge or possession on his part with respect to the period after August 15, 1957, on the basis of the hearsay declarations of the co-conspirator, Joseph Mogavero, and by refusing to instruct the jury, as requested by petitioner, that they could *not* consider such hearsay declarations for that purpose (R. 3711-12, 3248-9, 3285, 3288).

2. Inapplicability of the presumption of continuance.

A fundamental question in the important area of criminal conspiracy law is here presented relating to the scope and extent of the presumption of the continuance of membership in a conspiracy announced in *Hyde* v. *United States*, 225 U.S. 347 (1912), and the standard of proof governing the matter of withdrawal from the conspiracy.

Petitioner's position in the courts below was that the undisputed proof of his continuous incarceration in state prison, commencing more than three and one-half years prior to the crucial limitations date of August 15, 1957 and continuing until after the proven terminal date of the conspiracy here charged, operated to "remove the presumption of continuing participation by him in the conspiracy" and to require the Government to come forward with independent evidence of his continuance in the conspiracy subsequent to his incarceration. See *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573-4 (2d Cir. 1961); *Sandez* v. *United States*, 239 F. 2d 289, 243 (9th Cir. 1956); *Cleaver* v. *United States*, 238 F. 2d 766, 769 (10th Cir. 1956).

The Court of Appeals distinguished the foregoing cases on the ground that there "the defendant had been arrested for the very offense charged in the conspiracy indictment" (App. A, *infra*, p. 25a). The principle of those cases, however, is not limited to such a situation and applies as well to an arrest or incarceration on an independent charge. *Cf. United States* v. *Russano*, 257 F. 2d 712, 715 (2d Cir. 1958), cited as a supporting authority in *United States* v. *Consolidated Laundries Corp.*, *supra*, 291 F. 2d at 573-4. Application of the presumption of a conspirator's continued participation in the conspiracy necessarily presupposes his "Continuity of action to produce the unlawful result, or as stated in United States v. Kissel, supra (218 U.S. p 607 . . .), 'continuous cooperation of the conspirators to keep it up' . . ." See *Fiswick* v. *United States*, 329 U.S. 211, 216 (1946). The rationale underlying the rule that a conspirator's arrest or incarceration removes the presumption of continuance as to him is that his continuing participation in the conspiracy is thereby thwarted. See *Sandez* v. *United States*, *supra*, 239 F. 2d 239, 243. That rationale is equally applicable whether the arrest or incarceration is on a charge related to the conspiracy itself or on a separate charge.

The Court of Appeals below further suggested that *Hyde* was a bar to petitioner's position (App. A, *infra*, p. 24a). The situation involving a conspirator's arrest or imprisonment was, however, in no way involved in *Hyde* and is not controlled by that decision. While the *Hyde* decision, rendered more than fifty years ago, announced the rule that the presumption of continuance can yield only to evidence of "affirmative withdrawal", justice and logic demand the application of a broader standard. The presumption of

continuance is at best a purely artificial one which must yield to affirmative evidence inconsistent therewith, such as a showing of the particular defendant's incarceration, whether on the same or an independent charge. This Court itself has in another connection emphasized that a presumption may be applied only "with regard to its reasonableness in the particular case". *Maggio* v. *Zeitz*, 333 U.S. 56, 66 (1948). Obviously no reasonable basis remains for application of the artificial presumption of continuance in the face of a showing of the particular defendant's incarceration.

Apart from the presumption of continuance, there was a complete absence of legally sufficient independent evidence to establish petitioner's continuance in the conspiracy after his December 1953 incarceration. Rinaldo's testimony as to his December 1953 conversation with petitioner was entirely too equivocal to serve as a basis for such a finding, particularly when viewed in the light of Rinaldo's other countervailing testimony. *Cf. Ingram* v. *United States*, 360 U.S. 672, 680 (1959).

Even when considered in itself, the conversation was at least reasonably susceptible of the interpretation that petitioner was telling Rinaldo that he was withdrawing from the operation and that in the future Rinaldo was to take his orders from Locascio and Joseph Mogavero; that Joseph Mogavero was thereafter to be Locascio's partner in the operation in place of petitioner; and that in addition to receiving orders from Locascio as theretofore, Rinaldo would also be receiving orders from Joseph Mogavero as the new partner replacing petitioner. That interpretation indeed becomes the only rational view that can be taken of Rinaldo's testimony concerning that conversa-

tion, when read together with his other testimony by way of affirmation of the truth of his prior statements, that petitioner was no longer a party to the conspiracy or a partner of any of the principals therein, after he went to jail. At best, the situation was one "where proven facts give equal support to each of two inconsistent inferences", with the consequence that "neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other . . .". See *Penn R.R. Co.* v. *Chamberlain*, 288 U.S. 333, 339-40 (1933); *Byrne* v. *Matczak*, 254 F. 2d 543 (3d Cir.), cert. den. 358 U.S. 816 (1958).

Nor could the declarations of the co-conspirator Joseph Mogavero provide the requisite independent evidence to establish petitioner's continued participation in the charged conspiracy after his incarceration. *Cf. United States* v. *Consolidated Laundries, supra*, 291 F. 2d at 573-4. The proof required to establish such continuance, after removal of the presumption of continuance by reason of the showing of incarceration, must of necessity be the same kind of independent evidence that is essential to establish a defendant's initial participation in the conspiracy. It can consist only of evidence of the defendant's "own words and deeds", and cannot consist of the declarations of a co-conspirator. *Glasser* v. *United States*, 315 U.S. 60, 74-5 (1941); *United States* v. *Bentvena*, 319 F. 2d 916, 948-9 (2d Cir. 1963).

3. Jury's use of hearsay declarations to determine conspiracy issues of initial membership and continuance.

An important question in Federal criminal conspiracy prosecutions is here presented, as to the proper limitations on the use of co-conspirators' hearsay declarations to determine issues of membership and continuance in a charged conspiracy.

The Court of Appeals gave no consideration in its opinion to petitioner's contention that the Trial Judge erred in expressly permitting the jury to determine the question of petitioner's continued participation in the conspiracy on the basis of the hearsay declarations of the co-conspirator Joseph Mogavero, and in refusing to charge, as requested by petitioner, that the jury could not consider such declarations for that purpose but could only consider evidence of petitioner's own words or deeds (R. 3248-9; 3283-4, 3287-8).

Even if it were to be assumed that there was sufficient evidence to create a question for the jury as to whether petitioner continued as a party to the conspiracy after his incarceration (see *supra*, pp. 18-21), that issue, just like the issue of initial membership in the conspiracy, could be determined by the jury only on the basis of competent evidence exclusive of the hearsay declarations of any co-conspirator. *Cf. Glasser* v. *United States, supra*, 315 U.S. at 74-5.

By impliedly upholding the action of the Trial Judge in this respect, the Court of Appeals apparently adhered to the decisions in the Second Circuit that a co-conspirator's hearsay statements may be considered by the jury on the issue as to a particular defendant's membership in a

conspiracy, so long as the Trial Court decides that there is also independent evidence of such membership. See, e.g., *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2d Cir. 1950), affd. on other grounds, 341 U.S. 494 (1951).

It is respectfully submitted that the rule here applied by the Second Circuit Court of Appeals is unsound and should not be sanctioned by this Court. This Court has only recently re-emphasized that it has "consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a co-defendant made in furtherance of a conspiracy or joint undertaking." *Wong Sun* v. *United States*, 371 U.S. 471, 490 (1963). Unless and until it is first established by independent evidence that the particular defendant was a participant in the conspiracy, the declarations of a co-conspirator are incompetent hearsay. *Glasser* v. *United States*, *supra*, 315 U.S. at 74-5. It would directly militate against that rule to permit the jury to find the defendant's membership in the conspiracy, on the basis of such hearsay declarations, when their very competency is directly dependent on the assumed fact of such membership. *Cf. Lincoln* v. *Claflin*, 74 U.S. 132, 139 (1868); *American Fur Co.* v. *United States*, 27 U.S. 358, 365 (1829); *Wiborg* v. *United States*, 163 U.S. 632, 658 (1895). Hearsay may not be permitted thus to "lift itself by its own bootstraps to the level of competent evidence." *Glasser* v. *United States*, *supra*, 315 U.S. at 74-5.

The contention that "the only practicable way to deal with the question" is not to require the jury "to keep their minds in isolated compartments" (*United States* v. *Dennis*, *supra*, 183 F. 2d at 231), is unsound. That problem is frequently presented in multiple conspiracy cases

where a declaration made by one conspirator after termination of the conspiracy is held to be admissible as against him but not as against the co-defendants. While this Court has recognized that cautionary instructions by the trial judge to the jury that such an admission is evidence only against the declarant, "are insufficient to ward off the danger entirely", it has stressed that it is "extremely important that those safeguards be made as impregnable as possible." See *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947).

Furthermore, it is not true, as suggested in *Dennis*, that the co-conspirator's declarations would serve no evidentiary purpose if they could not be used by the jury as a basis for determining the particular defendant's membership in the conspiracy. Such declarations can thus serve the evidentiary purpose of establishing the commission of overt acts in furtherance of the conspiracy, after the jury has made its initial determination on the basis of independent evidence as to the existence of the conspiracy and the particular defendant's membership therein. Such a purpose would assume additional significance in a case, such as this, which also involves the question of whether overt acts attributable to a particular defendant occurred within the period designated by the statute of limitations.

The question of whether the jury may consider hearsay declarations in its initial determination of a defendant's membership in a conspiracy, was presented in the petition for certiorari to this Court in *Carbo* v. *U.S.*, filed July 10, 1963, cert. den. June 2, 1964. The "Brief for the United States in Opposition" to certiorari in that case, filed for Docket Nos. 122, 134, 141 and 145, provides a most cogent argument *for* petitioner's position in the instant case.

In that brief, discussing the question of an instruction to the jury that it must first determine a defendant's membership in a conspiracy upon the independent evidence submitted, before it may consider against him the hearsay declarations of co-conspirators, the Government stated (at p. 14) "there is no doubt that [such] instruction . . . is customarily given in conspiracy cases, whatever the nature of the conspiracy charged. See *e.g., Glasser* v. *United States*, 315 U.S. 60, 74." However, the Government stated, it was unnecessary to reach that question in the *Carbo* case

> "because, in this case, declarations were the very object of the conspiracy, so that proof of declarations was proof of the conspiracy itself.
>
> Our point is best illustrated by considering the difference between the offense here charged and a conspiracy to commit a common type of crime, such as operating an illegal still. In the latter situation, the object of the conspiracy is an act which does not in itself involve any declaration, and the nature of the conspiracy can be, and usually is, established by showing acts, rather than declarations, such as the finding of the still or the supplies for a still. The participation of a conspirator in the enterprise is shown by what he did, as, for example, delivering sugar to the site of still. In that type of situation it may be meaningful to tell a jury that they must first determine the nature of the conspiracy from evidence other than hearsay statements; that they must determine from independent evidence whether each defendant was a member of the conspiracy; and that only then should they consider against him declarations made by co-conspirators in furtherance of the conspiracy outside of his presence" (p. 15).

The Government then went on to distinguish the situation presented in the *Carbo* petition on the ground that the object of the conspiracy there "was to make declarations—threats—and the nature of the conspiracy could only be established by proving the threats" and, in such case, "the declarations were not incidental to the conspiracy charged" and thus were "not hearsay" (pp. 15-16).

The instant case, unlike *Carbo*, involves the very situation where the Government conceded that a rule contrary to *Carbo* might well be applicable—namely where "the object of the conspiracy is an act which does not in itself involve any declaration, and the nature of the conspiracy can be, and usually is, established by showing acts rather than declarations . . ." (Government's *Carbo* brief, *supra*, p. 15).

4. Denial of use of the tape recordings before the jury.

An important question involving the interpretation and application of 18 U.S.C. § 3500 is here presented.

It is undisputed that there were highly material inconsistencies between the trial testimony of the key Government witness, Rinaldo, and the statements previously given by him to the authorities (see *supra*, pp. 7-8). There can be no doubt as to the "crucial nature" of his testimony, since he was the sole uncorroborated witness against petitioner. *Cf. Jencks* v. *United States*, 353 U.S. 657, 667 (1957).

Rinaldo's critical prior inconsistent statements of October 23-24, 1960 had been recorded on a tape recorder at the time they were taken (R. 449, 549-50, 672-3). Typewritten transcriptions of the notes made by a stenographer

at the same time that the tape recordings were made, were turned over to the defense at the trial pursuant to 18 U.S.C. § 3500. Defense counsel requested that the tape recordings also be made available to them, for purposes of cross-examination (R. 628-9, 674, 1012). The Trial Judge, however, denied that request upon finding that the transcription, although not verbatim, was a "substantially accurate" record of the interview of Rinaldo on October 23-24 (R. 895, 786).

The Court of Appeals ruled that the tape recordings should "have been played to defense counsel to permit them to make their own determinations of the accuracy of the transcript rather than having to rely on the Judge's, although the failure to do this, in all likelihood, was not prejudicial." The Court of Appeals, however, took the position that the Trial Judge would be warranted in refusing to permit defense counsel to use the tape recordings before the jury unless counsel made "a preliminary showing of discrepancy" between the recording and the typewritten transcript. (App. A, *infra*, p. 26a, fn 10).

The consequence of the Court of Appeals' ruling is to deprive petitioner of an invaluable aid in the cross-examination of the crucial witness Rinaldo, to which he is entitled under 18 U.S.C. § 3500.

Although Rinaldo testified on direct examination for several days, pinpointing days, times, places and people for the entire period between 1950 and 1959, he continuously gave answers on cross-examination that he could "not recall" and "could not remember" the previous contradictory statements which he had made in his confession of October 23-24, 1960 (e.g., R. 778, 914, 1347). Very often,

the farthest he would go would be to say that he "may have" made the prior statements in question (e.g., R. 1899, 1900). Even after the pertinent portions of the transcription were placed before him for him to read, he maintained that his recollection was not refreshed as to whether he had made the prior statements (e.g., R. 915, 981, 1011, 1898-9).

The tape recordings, in the witness' own voice, of these inconsistencies and contradictions would have been invaluable in refreshing his recollection. The full force of his prior contradictory statements was lost upon the jury because defense counsel were denied the opportunity to have the jury and the witness himself hear the actual recordings of the statements previously made by him in his own voice.

It is clear that the intent of Congress in enacting § 3500 was to provide the defense with the most accurate reproduction of a Government witness' prior statement. *Palermo* v. *United States*, 360 U.S. 343, 351-2 (1959). Manifestly, the tape recording here was the most accurate reproduction of the statement, as well as "the best evidence". See *Gordon* v. *United States*, 344 U.S. 414, 421 (1953). The phrase "or a transcription thereof" in § 3500(e)(2) was meant to *expand*, not restrict, the statements to which the defense is entitled. *Palermo* v. *United States*, *supra*, 360 U.S. at 359, and Appendix B thereto.

Where, as in this case, the prior inconsistent statements have been made by the witness himself, in his own words, in his own voice, with all of the attendant inflections in the voice which could be important to a juror, using his common every day experience, in appraising the witness'

credibilty, it is clear that the original recording of the statement is *the* statement encompassed by the *Jencks* decision and § 3500. To paraphrase what this Court stated in *Gordon* v. *United States, supra,* in holding that a witness' admission of the prior inconsistency was no bar to the use of the prior statement itself by defense counsel for purposes of cross-examination, the accused is entitled to the use of "the best evidence" of the prior inconsistency—the recordng of the inconsistency in the witness' own voice—, "not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the . . . [prior statement's] impeaching weight and significance" (344 U.S. at 421).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED DONATI, JR.
Attorney for Petitioner

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 478—September Term, 1963.

(Argued June 11, 1964 Decided July 31, 1964.)

Docket No. 28721

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK BORELLI, DOMINICK CASTIGLIA, BENEDETTO CINQUEGRANO, THOMAS GARIBALDI, CARMINE LOCASCIO, ANGELO LOIACANO, ROSARIO MOGAVERO, MIKE SEDOTTO, DAVID "POP" SMITH, ROCCO SANCINELLA and HARRY TANTILLO,

Appellants.

Before:

FRIENDLY, SMITH and MARSHALL,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, convicting appellants of a conspiracy to violate the narcotics laws, 21 U. S. C. §§173-174, after a jury trial. Reversed for retrial.

MANUEL KATZ (Paul T. Smith on brief), Boston, Mass., *for Appellant Frank Borelli.*

JEROME J. LONDIN, New York, N. Y., *for Appellant Michael Sedotto.*

ERNST H. ROSENBERGER (Eve M. Preminger on brief), New York, N. Y., *for Appellant Angelo Loiacano.*

JACOB W. HELLER (Heller & Dretzin), New York, N. Y. (Moses L. Kove and Eugene L. Wishod, of Counsel), *for Appellant Benedetto Cinquegrano.*

HARVEY P. DALE (Anthony F. Marra, New York, N. Y.), *for Appellant Rocco Sancinella.*

JEROME LEWIS, Brooklyn, N. Y., *for Appellants David Smith, Thomas Garibaldi and Dominick Castiglia.*

ALFRED DONATI, JR., New York, N. Y., *for Appellant Rosario Mogavero.*

ALBERT J. KRIEGER, New York, N. Y., *for Appellants Carmine Locascio and Harry Tantillo.*

PETER FLEMING, JR. (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Charles A. Stillman, Robert J. Geniesse, Martin Gold, Edward M. Shaw and John Bartels, Assistant United States Attorneys, of Counsel), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

Appellants from conspiracy convictions too often remind us of *Kotteakos* v. *United States,* 328 U. S. 750 (1946), and of Mr. Justice Jackson's concurrence in *Krulewitch* v. *United States,* 336 U. S. 440, 445 (1949), in instances where

the reminder is inapposite. But a few facts will show in what degree the instant case gives point to Mr. Justice Jackson's description of conspiracy as "that elastic, sprawling and pervasive offense," whose development exemplifies, in Judge Cardozo's phrase, the "tendency of a principle to expand itself to the limit of its logic"—and perhaps beyond.

This indictment was filed August 15, 1962. The applicable statute of limitations is five years, 18 U. S. C. §3282. The conspiracy is alleged to have begun in 1950 and to have lasted until 1959. The only acts of participation proved as to one appellant were in 1951. As to others there was no evidence of participation later than 1955. Two who first appear in 1958 were found to have been in "partnership in crime," *Pinkerton* v. *United States,* 328 U. S. 640, 644 (1946), with those who, so far as the proof shows, left the stage seven and three years before. Tacitly recognizing inclusion of all the appellants in a single conspiracy to be something of a *tour de force* the Government contends in its able brief and argument that the convictions are buttressed by impressive authority and impeccable logic. The conspiracy, it says, was continuous as regards at least some of the principals; each participant is presumed to have been responsible for all that would ever go on, or that ever had; and he could terminate this responsibility only by making a clean breast to the authorities or by informing his colleagues—mostly unknown to him—that he was through. The appeal thus demands an examination of the application of the law of conspiracy to the long continued conduct of an illicit business. We have concluded that the case required a more carefully defined submission to the

jury than the Government sought and obtained. For this and other reasons discussed below we reverse the convictions and direct a new trial.

I. *The Government's Evidence*

The burden of the Government's case was borne by Salvatore Rinaldo, also its principal witness in *United States* v. *Agueci*, 310 F. 2d 817 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963). His testimony can be summarized as follows, postponing a few matters that will be mentioned where appropriate, and eliminating many details which are not here essential as they relate primarily to members of the conspiracy not involved in this appeal.

In the summer of 1950, Rinaldo met with Rosario and Joe Mogavero and Carmine Locascio, who wished him to travel to Italy to bring back "some junk." The trip was made around the turn of the year; Rinaldo paid $50,000 for the heroin. Rosario and Locascio then hired him to make deliveries, at a fee of $100 per package. Upon instructions from Rosario or Locascio, Rinaldo would pick up heroin at the "plant"—initially a machine shop, later Joe's home—and would make deliveries, typically of two or three kilos, to various wholesalers, including Tantillo, Cinquegrano and Borelli, who made their payments without using the agency of Rinaldo. This activity continued for some time with minor variations not here material. In December, 1953, Rosario began serving an eight-year New York state sentence for extortion. At a farewell meeting he said that "in the future I [Rinaldo] was to take orders from Joe Mogavero and Carmine Locascio, and to act just like I had acted before; just that I would be taking orders from

Joe Mogavero, but they would be just like coming from him."

Business continued much as theretofore. In June, 1954, Locascio introduced Rinaldo to one Jimmy Jerome, who later presented his runner, Mike Sedotto; Rinaldo began making deliveries to Sedotto. Another 1954 development was the deportation of Salvatore Caneba, the local representative of the Italian source of supply. In August, 1954, Locascio and Joe Mogavero introduced Rinaldo to a new connection, appellant David "Pop" Smith, from whom Rinaldo made large pick-ups, followed by deliveries, *inter alia*, to Borelli, Cinquegrano and Sedotto. The next year, 1955, saw the reestablishment of the Italian source of supply, although Smith also continued to be a provider.

Some of the heroin imported from Italy in the spring of 1955 proved to be impure; it would not dissolve or go through a needle. Sedotto returned a lot that he had picked up for Jerome. A second delivery from Italy in August 1955 was again a mixed batch—some of the heroin was pure, some not. Joe Mogavero and Locascio continued operations with the pure Italian heroin and with supplies obtained from Smith, but 42 kilograms of bad heroin became an albatross around the business' neck. Rinaldo made a trip to Italy to pay the Canebas a reduced price for the impure heroin. Their contention that they were entitled to $50,000 more than Rinaldo's principals were willing to pay led them to insist that any future dealings must be on a cash on delivery basis.

On Locascio's instructions, confirmed by Joe Mogavero, Rinaldo gave the former 20 kilograms of the impure heroin in May, 1956; Joe and Locascio had agreed to "try to get

rid of the stuff separately . . . It was too much, anyway, to be keeping in one place." In the ensuing months Joe and Rinaldo labored mightily to purify the 22 kilos of impure heroin which Joe had kept. In June or July, 1957, Joe told Rinaldo he had spent between $100,000 and $150,000 of Rosario's money and wanted to get moving again. In September or October, he explained that he was negotiating with appellant Loiacano for the sale of the 22 kilos; he later confided that Rosario had instructed him not to be sticky about the price. In December, 1957, Joe introduced Rinaldo to Loiacano and the latter's runner, appellant Sancinella, and instructed that deliveries of the impure heroin were to be made to the latter. Rinaldo made about seven such deliveries, the last in March, 1958.

The next chapter began shortly thereafter. Around April, 1958, Joe Mogavero and Loiacano, now risen to partnership rank, told Rinaldo they would have to get a new source of supply; the contact was to be Charles Di Palermo, a name frequently encountered in cases of this sort, but the place of delivery was uncertain. About May or June, Rinaldo was introduced to appellant Garibaldi whom Joe and Loiacano presented as the "fellow who would pick up the goods that I was getting." In July, Rinaldo was told to go to Miami to take delivery of heroin that was being brought in by ship. Di Palermo was there and sold him seven kilos. Rinaldo returned to New York and delivered these to Garibaldi against payment of $35,000 in small bills, which he took to Joe and Loiacano. Later Rinaldo made pick-ups from a new source of supply, Freddy Eppolito; these also he delivered to Garibaldi. In September, while making

further deliveries, Rinaldo complained to Garibaldi about receiving payment in small bills; the latter replied "that was the way he was getting the money from Borelli, and that's the way he was going to give it . . ." to Rinaldo. He also volunteered that it was he who had purchased Locascio's share of the impure heroin.

The last appellant to appear is Castiglia. Described as "Mickey Blair", he was introduced by Joe Mogavero to Rinaldo in November, 1958, as one who in turn would introduce a future deliverer of heroin. On several occasions between December, 1958 and March, 1959, through Castiglia's intercession, Rinaldo took deliveries from one Ralph; he in turn delivered to Garibaldi or Castiglia. The relationship between Rinaldo and his associates terminated in March, 1959, in a quarrel about money. Rinaldo thought he was to be a partner in the operations begun in 1958. Joe repudiated the suggestion, saying he had "spent all the cash that belonged to his brother, Saro, and the only way he could get even is if I [Rinaldo] wanted to work at $200 a kilo . . ." On Rinaldo's questioning whether this harsh attitude to him had Rosario's sanction, Joe said he had talked to Rosario "about this, and his brother gave him the okay to do anything he wanted."

Although the Government supported Rinaldo's testimony with evidence confirming his comings and goings and showing the existence of a secret closet in Joe Mogavero's apartment, the only other directly inculpatory evidence was the testimony of Sierra, relating to Sedotto, and of Ager, relating to Smith. Sierra, who had been in prison since 1957 on a federal narcotics conviction, testified to purchases of heroin in 1955 and early 1956 from Jimmy Jerome, with

the deliveries being made by Sedotto. Some of this heroin was impure; consequent unpleasantness led to an interruption of contacts. These were renewed in July and August, 1956, and then again in December, 1956, and Sedotto engaged in several of them. The coincidence of dates and the impurity of part of the heroin afforded some basis for concluding that these deliveries were of heroin emanating from Joe Mogavero or Locascio.. Ager, under indictment for a federal narcotics offense, testified that in May or June, 1954, at his father's instance, he received a "16 unit" suitcase from Charles Bourbonnais which he delivered to Smith, who later gave him bags of money. This process was frequently repeated through 1955 and 1956, with Smith making numerous payments of about $40,000 at the rate of $5,000 per unit. Late in 1956, Smith complained of the quality. This led to a gap, but there was another delivery in mid-1957, the last payment for which was made in February, 1958. Ager's deliveries to Smith synchronized with Smith's deliveries to Rinaldo, although apparently they were larger in amount and continued longer. The deliveries Rinaldo received of Smith were generally of sixteen kilograms.

II. *"Single" Conspiracy*

The indictment alleged a single conspiracy, and the court instructed the jury that if it found "that the government has failed to prove the existence of one conspiracy, you must find the defendants not guilty" and that "proof of several separate and independent conspiracies involving various of the defendants . . . is not proof of the single

conspiracy charged . . ." Appellants contend that the evidence showed several conspiracies and, in the alternative, that the judge's failure to furnish the jury with an intelligible criterion for determining the issue of the one versus the many constituted "plain error" correctible under F. R. Crim. Proc. 52(b).[1] The Government responds that the evidence warranted the jury's finding a single "chain" conspiracy as in *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir.), rev'd on other grounds, 308 U. S. 287 (1939); *United States* v. *Rich*, 262 F. 2d 415 (2 Cir. 1959); *United States* v. *Stromberg*, 268 F. 2d 256 (2 Cir.), cert. denied, 361 U. S. 863 (1959); *United States* v. *Agueci, supra;* and *United States* v. *Bentvena*, 319 F. 2d 916 (2 Cir.), cert. denied, 375 U. S. 940 (1963); and that the instruction was sufficient, at least in the absence of a request containing a better one or a pertinent exception. In this case whether there was a single or several conspiracies was extraordinarily significant because, in addition to the questions with respect to the admission of declarations that are often presented, the

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[1] The charge on the subject was as follows:

"In determining whether there was a single conspiracy, you may consider what the evidence shows as to changes of personnel and activity, but you may find a single conspiracy even though there were changes in personnel and activities, provided that you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy continued to be those charged in the indictment.

"But, on the other hand, if you find that one conspiracy terminated and another one was formed you may not find a single conspiracy, even though the purposes of both conspiracies were the same and that some of the defendants were members of both."

The judge had previously charged:

"Now, a conspiracy once formed, ladies and gentlemen, is presumed to continue as to each alleged participant until either its object has been accomplished or there has been some affirmative act by that participant of termination or withdrawal."

issue bore importantly on the problem of the statute of limitations. Cf. *Berger* v. *United States*, 295 U. S. 78, 81-83 (1935); *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947); *United States* v. *Agueci, supra*, 310 F. 2d at 827-28.

As applied to the long term operation of an illegal business, the common pictorial distinction between "chain" and "spoke" conspiracies can obscure as much as it clarifies. The chain metaphor is indeed apt in that the links of a narcotics conspiracy are inextricably related to one another, from grower, through exporter and importer, to wholesaler, middleman, and retailer, each depending for his own success on the performance of all the others. But this simple picture tends to obscure that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs—in other words the extreme links of a chain conspiracy may have elements of the spoke conspiracy.[2] More-

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[2] Thus, in the oft-cited *Bruno case*, although it is clear enough that "*quoad* the smugglers, there was but one conspiracy, for it was of no moment to them whether the middlemen sold to one or more groups of retailers, provided they had a market somewhere," 105 F. 2d at 923, it is not so clear why the New York and Texas groups of retailers were not in a "spoke" relation with the smugglers and the middleman, so that there would be two conspiracies unless the evidence permitted the inference that each group of retailers must have known the operation to be so large as to require the other as an outlet. Cf. *United States* v. *Stromberg, supra*, 268 F. 2d at 264, and see Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the A. L. I.: Attempt, Solicitation, and Conspiracy, Part II, 61 Colum. L. Rev. 957, 981-84, 994 (1961); The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276 (1948); Federal Treatment of Multiple Conspiracies, 57 Colum. L. Rev. 387 (1957). Whether such a variance would cause any prejudice is a wholly different matter.

over, whatever the value of the chain concept where the problem is to trace a single operation from the start through its various phases to its successful conclusion, it becomes confusing when, over a long period of time, certain links continue to play the same role but with new counterparts, as where importers who regard their partnership as a single continuing one, having successfully distributed one cargo through X distributing organization, turn, years later, to moving another cargo obtained from a different source through Y. Thus, however reasonable the so-called presumption of continuity may be as to all the participants of a conspiracy which intends a single act, such as the robbing of a bank, or even as to the core of a conspiracy to import and resell narcotics, its force is diminished as to the outer links—buyers indifferent to their sources of supply and turning from one source to another, and suppliers equally indifferent to the identity of their customers.

The basic difficulty arises in applying the seventeenth century notion of conspiracy, where the gravamen of the offense was the making of an *agreement* to commit a readily identifiable crime or series of crimes, such as murder or robbery, see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 922, 923 (1959), to what in substance is the conduct of an illegal business over a period of years. There has been a tendency in such cases "to deal with the crime of conspiracy as though it were a group [of men] rather than an act" of agreement. See 72 Harv. L. Rev. at 934. Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of

agreement or understanding existed as to each defendant. It is a great deal harder to tell just *what* agreement can reasonably be inferred from the purchase, even the repeated purchase, of contraband, than from the furnishing of dynamite to prospective bank robbers or the exchange of worthless property for securities to be subsequently distributed. Purchase or sale of contraband may, of course, warrant the inference of an agreement going well beyond the particular transaction. A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods over an uncertain period of time, and the circumstances may also warrant the inference that a supplier or a purchaser indicated a willingness to repeat. But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction.

The view that if the evidence warrants the finding that some defendants were parties to a single agreement to sell contraband for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose, is thus a considerable over-simplification. Rinaldo's testimony thoroughly warranted the finding of an agreement among himself, Joe and Rosario Mogavero beginning in 1950 and continuing through 1959. But it does not follow, for example, that his recital of two deliveries to Tantillo in March and July, 1951, on the instructions of Locascio in one instance, and of Rosario Mogavero in the other, would justify a finding that Tantillo had thereby made himself a part of whatever narcotics enterprises

Locascio, the Mogaveros and their future partners might engage in for the rest of their lives, provided only that these were uninterrupted—a theorem that would lead to the inevitable but extraordinary conclusion that Tantillo's two purchases entered him into a "partnership in criminal purposes," *United States* v. *Kissel*, 218 U. S. 601, 608 (1910), with Castiglia, who supplied a source to and took deliveries from an altered core seven years later, and *vice versa*.[3] We agree with the Government that the evidence links Tantillo with central figures in the conspiracy sufficiently to render inapplicable our decisions in *United States* v. *Koch*, 113 F. 2d 982 (1940) or in *United States* v. *Stromberg*, *supra*, 268 F. 2d at 267 [as to Snyder]. For reasons later stated, we agree also that Tantillo did not make out the affirmative defense of withdrawal as a matter of law. But before that issue is reached, the Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation, *Grunewald* v. *United States*, 353 U. S. 391, 397 (1957), and the scope of his agreement must be determined individually from what was proved as to him. If, in Judge Learned Hand's well-known phrase, in order for a man to be held for joning others in a conspiracy, he "must in some sense promote their venture himself, make it his own," *United*

[3] The Government relies also on a chance meeting between Rinaldo and Tantillo in 1960, where, after some casual conversation, "Tantillo told me that he was sorry that he had to stop picking up from me; that although he was paying 11,000 a kilo for it, there was plenty of margin for him." The inference from this is not at all helpful to the Government, it shows that Tantillo, far from being indissolubly linked with the central core, was willingly buying from someone else.

States v. *Falcone*, 109 F. 2d 579, 581 (2 Cir.), aff'd, 311 U. S. 205 (1940), it becomes essential to determine just what he is promoting and making "his own."

The utmost time bounds of any conspiracy proved as to Tantillo was the liquidation of the partnership between the Mogavero brothers and Locascio by the disposal of the last of the impure heroin imported from the Caneba source in Italy; we see nothing in the mere fact of his purchases that would warrant an inference that he agreed to participate in the activity, begun nearly seven years later, in which Loiacano replaced Locascio as partner of one or both of the Mogaveros, and which depended on wholly new sources of supply. It is indecisive on this issue that there was no substantial time gap between the two phases of the venture and that the jury might permissibly consider there to have been a single continuing agreement as regards the Mogaveros, Loiacano and Rinaldo; the change in operations was sufficient to spend any force remaining in the inference of agreement arising from Tantillo's purchases of long ago. Compare, in a different but relevant context, *Maggio* v. *Zeitz*, 333 U. S. 56, 66 (1948).

Tantillo was thus entitled to an instruction which would make his conviction depend on the jury's accepting Rinaldo's testimony that Joe Mogavero's share of the impure heroin divided by the partnership was not sold until after August 15, 1957. The jury's attention should then have been focused on the extent of the agreement attributable to Tantillo on the basis of his two purchases. Specifically, the jury should have been asked to decide whether the evidence showed that Tantillo was associating himself with the continuing enterprise of importations from Italy being

conducted by the Mogavero brothers and Locascio, carrying through the final disposition of the impure heroin, or only with a plot to move what had already been imported. "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." *United States* v. *Peoni*, 100 F. 2d 401, 403 (2 Cir. 1938). Although this may further complicate the already complex charge in a narcotics conspiracy trial, a requirement necessary to protect a defendant from over-exertion of a legal doctrine may not be dispensed with simply because it some what lessens the attractiveness of prosecuting for conspiracy rather than for substantive crimes. By no means every conspiracy trial will raise the problem here considered. Often the defendant's act will not have the ambiguity with respect to the inference of agreement that is inherent in the mere purchase, transportation or sale of contraband; even in cases where some ambiguity exists, the precise scope of his agreement would not always be sufficiently important that the judge would be required to stress it in his charge; here, because of the problem of limitations, it could be critical.[4]

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[4] We realize that in a case not involving a time bar, the scope of a defendant's agreement is often pertinent to the admissibility of implicating declarations by alleged co-conspirators and to the relevance of evidence of their acts. However, many, perhaps most, declarations concerning a defendant who was no longer participating in the conspiracy would be barred in any event by the requirement that these be in furtherance of the conspiracy and not be merely narrative. *Van Riper* v. *United States*, 13 F. 2d 961, 967 (2 Cir.), denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702 (1926); *United States* v. *Goodman*, 129 F. 2d 1009, 1013 (2 Cir. 1942); *United States* v. *Annunziato*, 293 F. 2d 373, 380

What we have written with respect to Tantillo[5] applies, *mutatis mutandis*, to Locascio, Cinquegrano, Sedotto, Smith and Sancinella;[6] although these may have played more important roles than Tantillo—indeed in Locascio's case it is plain, if Rinaldo's testimony is believed, that his activity was central—we see no evidence that would warrant a jury in finding that they became parties to the activity that be-

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Footnote 4—continued:

(2 Cir.), cert denied, 368 U. S. 919 (1961); to the extent they would not be, a defendant is entitled to the protection we have outlined. As to the relevance of evidence of acts of alleged co-conspirators outside the scope of a particular defendant's agreement, a general instruction will suffice, and we doubt that this will either be confusing to the jury or be nugatory—as witness the acquittal of five defendants here. In cases like this the existence of a conspiracy is not usually in serious question; the controverted issues are the various defendants' connections with it. The court always charges that this must be determined on an individual basis; we hold only that where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants.

5 Tantillo complains also that he was sentenced to 10 years for the offense of conspiracy added to 21 U. S. §174 by the Act of November 2, 1951, 65 Stat. 767. Before that, 18 U. S. C. §371, had made it a crime to conspire to violate 21 U. S. C. §§173-74, but the maximum imprisonment was five years. Unless the jury finds that Tantillo entered into and remained in a conspiracy continuing beyond November 2, 1951 to August 15, 1957, the statute of limitations will bar any punishment; if it does find that, the increased punishment is not *ex post facto*. *United States* v. *Markman*, 193 F. 2d 574 (2 Cir.), cert. denied *sub nom. Livolsi* v. *United States*, 343 U. S. 979 (1952).

6 Sancinella's case illustrates how the determination of the scope of the agreement will often be relatively inconsequential. Even if his only agreement was to aid in the disposal of the impure heroin, this continued into the period not barred by limitations and the proof against him was Rinaldo's testimony as to his acts, not declarations of other persons about them.

gan in April, 1958. Although the evidence implicating Loiacano both in the earlier and in the later phase was such that we might well consider any error on the single conspiracy issue to have been harmless with respect to him, see *United States* v. *Cohen*, 145 F. 2d 82, 88-89 (2 Cir. 1944), cert. denied, 323 U. S. 799, 800 (1945); *United States* v. *Benjamin*, 328 F. 2d 854, 864 (2 Cir.), cert. denied, —— U. S. —— (1964), it would be best to have the jury determine whether he became a party to both phases, since if it were not convinced of his participation in the second, any finding of guilt on the first must hinge, as it should be told, on accepting Rinaldo's testimony as to the continuation of the efforts to dispose of the bad heroin beyond August 15, 1957. Garibaldi's acts related to the second phase but his admission that he was the purchaser of Locascio's share of the bad heroin would permit a finding that he was also a party to the first; the instructions as to him should parallel those as to Loiacano. As to Rosario the evidence sufficed to show participation in a single continuing conspiracy with his brother Joe and Rinaldo; his position as banker and his farewell address were sufficient evidence of his continuing participation to render admissible his brother's statement further implicating him in the second phase. There was no evidence connecting Castiglia with the activities prior to the resort to new sources of supply in April, 1958; the jury should have been instructed to disregard all evidence of these in determining his guilt.

This leaves Borelli. The only evidence expressly connecting him with the later phase consists of Garibaldi's declaration in September, 1958, that Borelli was then dealing with him; this was admissible against Borelli only if

other evidence permitted the inference that he had associated himself with the continuing venture. See *United States* v. *Reina*, 242 F. 2d 302 (2 Cir.), cert. denied *sub nom. Moccio* v. *United States*, 354 U. S. 913 (1957). Borelli had been one of the first purchasers, in May, 1951. From that time until late in 1955, deliveries to him were so frequent and so large as to suggest strongly that he was a continuing customer on whom Joe Mogavero could rely during the second phase of the conspiracy in which Garibaldi was a prominent figure. Although such evidence, standing alone, might not have sufficed to warrant submitting Borelli's participation in the second phase of the activity to the jury, the judge could properly deem it enough to meet the threshold requirement of showing the likelihood of an association between Borelli and Garibaldi and thus to render admissible the latter's statement confirming the association; with this added, the evidence of Borelli's participation in both phases of the conspiracy was sufficient for persuasion beyond a reasonable doubt. *Cf. United States* v. *Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950), aff'd 341 U. S. 494 (1951); *Carbo* v. *United States*, 314 F. 2d 718, 735-38 (8 Cir. 1963), cert. denied, June 2, 1964; McCormick, Evidence, §53 (1954); Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392, 415-18 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165, 169, 175, 188 (1929). Like Loiacano and Garibaldi, Borelli was entitled to an instruction that if the jury found the evidence insufficient to link him with the second phase, his liability to conviction de-

pended on whether the efforts to dispose of the bad Italian heroin lasted beyond August 15, 1957.

We add a word why our conclusion on the single conspiracy issue does not require us to direct that any of the defendants be acquitted or even that on a retrial the Government elect between the first and the second phase of the conspiracy, as in *United States* v. *Russano*, 257 F. 2d 712, 716 (2 Cir. 1958). In contrast to that case, the Government's evidence here was sufficient to permit a finding of a single continuing conspiracy by several defendants, Rosario Mogavero, Loiacano, Borelli and Garibaldi, along with Joe Mogavero and Rinaldo. It sufficed also to show that Locascio, Tantillo, Cinquegrano, Sedotto, Smith and Sancinella had joined with them in one phase of their criminal enterprise and Castiglia in another. This met the joinder requirements of F. R. Crim. Proc. 8, cf. A. L. I. Model Penal Code, §5.03(4); such variance as there was from the indictment required only the giving of appropriate instructions. See *Berger* v. *United States*, 295 U. S. 78, 82-83 (1935); *United States* v. *Cohen*, *supra*, 145 F. 2d 82, 88-89; *United States* v. *Agueci*, *supra*, 310 F. 2d at 827-28.[7] The case thus is one of trial error, not of misjoinder or of failure of proof.

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[7] Our view that each defendant can be held only for an agreement reasonably inferable as to him reinforces the Government's already sufficient answer to Loiacano's claim that his conviction in *United States* v. *Bentvena*, 319 F. 2d 916 (2 Cir.), cert. denied, 375 U. S. 940 (1963), clothes him with the defense of double jeopardy. See *United States* v. *Aviles*, 274 F. 2d 179, 193 (2 Cir.), cert. denied, 362 U. S. 974, 982 (1960), further proceedings remained on other grounds, 375 U. S. 32 (1963).

III. *Withdrawal.*

Seven appellants, Tantillo, Sedotto, Borelli, Smith, Locascio, Rosario Mogavero, and Cinquegrano, contend that the evidence established as a matter of law that they withdrew from the conspiracy before August 15, 1957. The contentions of the first four rest primarily on the alleged absence of evidence of activity on their part after times prior to the cut-off date. Locascio relies on such absence of evidence and also on Rinaldo's testimony as to his split with the Mogaveros. The last two rely heavily on their incarceration—Rosario's, resulting from a state extortion conviction, beginning late in 1953, Cinquegrano's, for an unrelated federal narcotics offense, starting early in 1956, and both continuing beyond the critical date.

The Supreme Court last spoke comprehensively on withdrawal from a conspiracy in the opinion of Mr. Justice McKenna for five Justices in *Hyde* v. *United States,* 225 U. S. 347, 369 (1912)—the four dissenters not reaching this issue. It laid down rigorous requirements for making out the defense of withdrawal from a conspiracy "having continuity of purpose and which contemplated the performance of acts through a series of years. . . . Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law." Mere cessation of activity is not enough to start the running of the statute; there must also be affirmative action, either the making of a clean breast to the authorities, cf. *Fiswick* v. *United States,* 329 U. S. 211, 217 (1946), or com-

munication of the abandonment in a manner reasonably calculated to reach co-conspirators. And the burden of establishing withdrawal lies on the defendant. See 72 Harv. L. Rev. at 958; Wechsler, Jones and Korn, *supra*, 61 Colum. L. Rev. at 1015-17; *United States* v. *Cohen, supra*, 145 F. 2d at 90; *United States* v. *Compagna*, 146 F. 2d 524, 527 (2 Cir. 1944), cert. denied, 324 U. S. 867-68 (1945); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573 (2 Cir. 1961).

It is argued that however well founded the *Hyde* rule was on its facts, where, as the Government urged in its brief to the Supreme Court [pp. 75 ff.], the defendant Schneider's pre-limitation conduct, in procuring false and fictitious applications for school lands and otherwise, resulted in the passage of titles in the General Land Office within the period,[8] the requirement of showing affirmative action is too severe for cases where a defendant simply engaged in the supply, transportation, or purchase of contraband before the period of limitations and the only effects realistically continuing into the period were the profits the central core had realized and its hope of further assistance. We should be obliged to give most serious consideration to this argument if, as urged by the Government, mere proof of past dealings with the core sufficed to permit a jury to infer an agreement to participate in its continuing activities to the end of time. However, our conclusion, explained

[8] As was persuasively said in the Solicitor General's brief (p. 79), "When conspirators have set a dynamite machine with a timed fuse in position to blow up a building and go away and leave it to do its destructive work in due course of time, they are continuing in their purpose and are in the actual execution of that purpose every moment of time until the machine explodes."

above, that so broad an inference is not allowable, deprives the argument of a good deal of its force. Since each defendant can be held only for that part of the conspiracy which he understood and assented to, and since the statute will begin to run for him when his own agreement terminates, it is neither unfair nor unreasonable to require affirmative demonstration that he was abrogating it at an earlier date. We note that the A. L. I. Model Penal Code, which requires separate determination of the scope of the agreement made by each defendant, preserves substantially the traditional test as to withdrawal. See §5.03(1), (2) and (7), especially (7)(c); Tent. Draft No. 10, pp. 104, 117-26, 153-55 (May, 1962); Wechsler, Jones and Korn, *supra*, 61 Colum. L. Rev. at 979-94, 1015-17. We thus overrule the contentions of Tantillo, Sedotto, Borelli and Smith, that they were entitled to acquittal, on the basis of withdrawal, as a matter of law. Indeed, so far as concerns the last three, we fail to see how the evidence raised any jury issue on withdrawal as a matter of fact; even if the rigors of the *Hyde* rule were to be somewhat relaxed, mere failure by the Government to prove that activity by a particular conspirator continued into the period of limitations would not inevitably require the court to have the jury consider the defense of withdrawal.[9] Tantillo's case is different; his later statement to Rinaldo, see fn. 3, which the Government placed in evidence, combined with the fact that only two

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[9] In fact there was such evidence as to Borelli, as we have held. The Government contends that Ager's testimony as to deliveries to Smith in mid-1957 and payments in 1958 showed activity by him within the statutory period, but we do not think these were sufficiently connected with the conspiracy so that evidence concerning them was admissible.

instances of contact were shown, these occurring six years before the beginning of the statutory period, raised an issue for the jury whether he had not sufficiently mainifested an intention to withdraw.

The evidence as to Locascio's split with the Mogaveros in 1956, although sufficient to present a jury issue as to withdrawal, was far from requiring acquittal as a matter of law. Rinaldo gave testimony as to activity by Locascio early in 1957, noted in the final paragraph of this opinion, which the jury would have had to consider on this issue. Moreover, a finding that Locascio terminated all relations with his associates in 1956 would not demand an acquittal. We see no flaw in the Government's argument that such a dissolution of the 1950 partnership would not constitute an effective withdrawal so long as any of the contraband obtained during his participation was being sold. We do not have to go so far as *Eldredge* v. *United States*, 62 F. 2d 449 (10 Cir. 1932), to reach that conclusion. The sale of all the heroin—the Mogaveros' share as well as Locascio's—was the very object of the conspiracy; mere bifurcation of the routes of disposal for the conspirators' mutual convenience does not bring the activity to an end for any of them. Locascio could therefore be convicted if the jury accepted Rinaldo's testimony that the Mogavero share was not liquidated until after August 15, 1957.

Turning to the two defendants who were incarcerated, we speedily dismiss Rosario Mogavero's claim to acquittal. Neither authority nor reason would suggest that imprisonment necessarily shows a withdrawal; indeed, we have recently held squarely to the contrary, *United States* v. *Agueci, supra*, 310 F. 2d at 838-39. Although the evidence

of Rosario's continued participation after his incarceration was less strong than as to Valachi's in *Agueci*, it was strong enough for the jury to find that, far from withdrawing, he continued to be a significant member of the conspiracy.

Cinquegrano cites a number of opinions with passages suggesting that although confinement of a defendant does not constitute withdrawal as a matter of law, it is sufficient unless the Government comes forward with evidence of continued participation. We find difficulty in reconciling such broad statements with what the Supreme Court said in *Hyde*; we see no basis for thinking that if in that case the defendant Schneider had been incarcerated for an unrelated offense more than three years before the indictment, the Court would have ruled one whit differently. The expressions cited are an expectable judicial reaction to extravagant claims of prosecutors that a few acts of assistance by persons on the periphery warrant a jury's finding an agreement to participate forever in the activities of the central core; our approach to that claim permits the defense of withdrawal to be confined in a manner more consistent with reason and with the authorities earlier cited. Some of the opinions suggested this precise ground that the agreement of a particular defendant might not be co-terminous with the over-all conspiracy. *Buhler* v. *United States*, 33 F. 2d 382, 385 (9 Cir. 1929) [not an arrest case]; *Poliafico* v. *United States*, 237 F. 2d 97, 105-06 (6 Cir. 1956), cert. denied, 352 U. S. 1025 (1957). In *Fiswick* v. *United States*, *supra*, 329 U. S. at 217, *Cleaver* v. *United States*, 238 F. 2d 766, 769 (10 Cir. 1956), and *Gay* v. *United States*, 322 F. 2d 208 (10 Cir. 1963), the confessions of co-conspirators after arrest were ruled inadmissible since, far from furthering

the purposes of the conspiracy, they frustrated it; such confessions, if complete, would be sufficient to make out a withdrawal. The declarations in *United States* v. *Carminati*, 247 F. 2d 640, 645-46 (2 Cir.), cert. denied, 355 U.S. 883 (1957), also were merely narrative and therefore inadmissible. The "core" members of the conspiracy were incarcerated in *United States* v. *Russano*, 257 F. 2d 712 (2 Cir. 1958); this was held to have brought the conspiracy to an end. In the cases not thus distinguishable, *Sandez* v. *United States*, 239 F. 2d 239, 243 (9 Cir. 1956), rehearing denied, 245 F. 2d 712 (1957), and *United States* v. *Consolidated Laundries Corp., supra*, 291 F. 2d at 573-74, as well as in *Cleaver* v. *United States, supra*, 238 F. 2d at 769, and *United States* v. *Carminati, supra*, 247 F. 2d 640, the defendant had been arrested for the very offense charged in the conspiracy indictment. Assuming without deciding that the unlikelihood of the other conspirators' relying for further aid on a person known to be confined for the very offense in which they were engaging makes such confinement a sufficient "affirmative act" to sustain the defense of withdrawal in the absence of countervailing evidence—and that a holding to that effect would be permissible under the *Hyde* opinion, this would not serve Cinquegrano who pleaded guilty to an unrelated narcotics offense—and we see no basis for going further. We therefore overrule Cinquegrano's claim that his 1956 incarceration entitled him to acquittal under the statute of limitations as a matter of law. Proof of his conviction was offered only to the court in a motion for acquittal; if on retrial Cinquegrano chooses to place the fact in evidence, this will raise a question for the jury on the issue of his withdrawal.

IV. *Rulings with respect to Rinaldo's prior statements and to grand jury testimony*

In addition to the reasons in Part II of this opinion, we would be required to reverse, at least as to certain appellants, because of rulings on two issues relating to Rinaldo's testimony.

Rinaldo had been taken into custody by the Westchester County police in 1960 and had made long statements, in question and answer form, in the presence of Federal narcotics agents, the transcript of which was made available to defense counsel.[10] During his cross-examination, in a number of instances where counsel considered the earlier statements more favorable, Rinaldo affirmed that in his prior answers, as well as in those at the trial, he was telling the truth.

When a witness thus affirms the truth of a prior statement, the earlier statement is to be considered "not only as bearing on the credibility of the witness but as affirmative evidence." *Stewart* v. *Baltimore & Ohio R.R.*, 137 F. 2d 527, 529 (2 Cir. 1943); the trier of the facts has "two conflicting statements . . . of equal force as evidence," *Zimberg* v. *United States*, 142 F. 2d 132, 136 (1 Cir.), cert. denied, 323 U. S. 712 (1944). See also *Harman* v. *United States*, 199

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10 We see no reason why the tape recordings of the interview, insofar as these related to Rinaldo's direct testimony, should not have been played to defense counsel to permit them to make their own determinations of the accuracy of the transcript rather than having to rely on the judge's, although the failure to do this was, in all likelihood, not prejudicial. Use of the tape recordings before the jury would have been a different matter, as to which the judge could well have required a preliminary showing of discrepancy. See *United States* v. *McKeever*, 271 F. 2d 669, 676 (2 Cir. 1959).

F. 2d 34, 36 (4 Cir. 1952); *Finnegan* v. *United States*, 204 F. 2d 105, 115 (8 Cir.), cert. denied, 346 U. S. 821 (1953).[11] In the discussions of requests to charge, the judge indicated that, consistently with these authorities, he would allow the jury to consider Rinaldo's prior statements as being affirmative evidence and not merely as impeaching credibility. But we do not read the instruction given as carrying this out. Defense counsel, who did not regard it as having done so, took proper exception, but the judge declined to alter it. There is, indeed, a question whether this error alone would require reversal. The prior statements relating to Rosario's continued participation after incarceration and to the definitiveness of Locascio's retirement in 1956, could well be viewed merely as quick characterizations and hence as not truly inconsistent with the trial testimony. Still a jury would not necessarily consider them in that light, and with the Government's case so dependent on Rinaldo's testimony, we could hardly be certain that the error might not have affected the two defendants primarily concerned.

Taking full advantage of the ruling, in *Costello* v. *United States*, 350 U. S. 359 (1956), that an indictment may be based on hearsay, the Government did not bring Rinaldo before the grand jury but instead had Selvaggi, a federal narcotics agent, tell the story Rinaldo had told him. Called as a defense witness on some minor matters, Selvaggi

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11 This principle long antedates and is quite different from our decision in *United States* v. *De Sisto*, 329 F. 2d 929 (2 Cir.), cert. denied,—— U. S. —— (1964), that two kinds of prior statements by a witness under examination—testimony on a former trial and before a grand jury (together with identifications affirmed by such testimony)—may be considered as independent evidence even though the witness *repudiates* them at the trial.

admitted that "a certain portion of" Rinaldo's trial testimony was inconsistent with his narration of it to the grand jury. Defense counsel then joined in a motion that the court inspect the grand jury minutes to determine these inconsistencies and make the relevant minutes available. The judge declined to do this except for inconsistencies between Selvaggi's own grand jury and trial testimony.

If Rinaldo had testified before the grand jury, the defendants would have been entitled to have the judge inspect the minutes and turn over any parts useful for cross-examination. *United States* v. *Zborowski*, 271 F. 2d 661, 665-68 (2 Cir. 1959); *United States* v. *Hernandez*, 282 F. 2d 71 (2 Cir. 1960), on rehearing, 290 F. 2d 86 (1961). The Government ought not be allowed, by having its principal witness speak to the grand jury through the voice of another, to deprive a defendant of this right to impeach by contradiction. It is true that inconsistencies found in the grand jury testimony of such a surrogate are less susceptible of effective use than if the witness himself had testified; when the witness is confronted with what appears to be an inconsistency, he may deny having made the contradictory statement to the agent and counsel's only recourse would be to call the agent and endeavor to have him prove the contrary. But this is not a sufficient reason for the court's refusing to open this avenue of impeachment; whether it is worth pursuing will then be for counsel to decide. We have reviewed Selvaggi's grand jury testimony and have found some differences between what he said Rinaldo had said and what Rinaldo said at the trial; although these are

hardly nation-shaking, we cannot say that none would be susceptible of effective use.[12]

IV. *Other matters*

Although our direction of a new trial makes it unnecessary to consider many points dealing with matters not likely to recur, we wish to mention one of these because of the serious implications that it and incidents in other cases, cf. *United States* v. *Gersh*, 328 F. 2d 460 (2 Cir.), cert. denied, —— U. S. —— (1964), have for the administration of criminal justice under the jury system.

During the trial seven jurors received unsigned letters reading in substance:

> "Find these guinea sons of bitches guilty. Don't let them get away with something they did a long time ago. Send them to jail now, all those Mafia bums."

Some of the jurors considered the notes as threats, with a meaning opposite to what they said. The incident received careful and sensitive attention from the judge, the alleged inadequacy of which we need not consider in view of our disposition of the case. But it demonstrates the need for precautions assuring that the addresses, and perhaps even the names, of jurors in cases such as this will be held in confidence; courts must protect the integrity of criminal trials against this kind of disruption, whether it emanated from defendants' enemies, from their friends, or from neither.

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[12] In contrast, the judge's refusal to inspect Rinaldo's grand jury testimony in *United States* v. *Agueci* was a proper exercise of discretion; Rinaldo's testimony in that trial was available, and there is nothing to suggest that his grand jury testimony concerned any facts relevant to this case.

It remains to deal briefly with certain rulings on questions of evidence that may recur on a new trial. Two of these related to the examination of Ager. The defense had questioned him as to a statement he had given to the Government, in which he minimized his acquaintance with Bourbonnais and denied making any deliveries; Ager said the prior statement was false, and the judge then declined to receive it. The judge should have permitted the written statement to be introduced as affecting Ager's credibility rather than to force the defense to rely for impeachment solely on Ager's fleeting oral admission that he had lied on the earlier questioning. 3 Wigmore, Evidence §§1017, 1037 (1940 ed.); but *cf.* McCormick, Evidence 68 (1954). Ager had referred to the suitcases as having "16 units"; he later amplified this to 16 kilograms. When pressed by the Government for further explanation, he said "it must have been narcotics." On this being ruled out, the prosecutor, over objection, was allowed to ask "Do you know now what was in those suitcases?", which elicited substantially the same answer as had been rightly stricken; the objection should have been sustained in the absence of a showing that Ager was giving "an impression derived from the *exercise of his own senses,* not from the reports of others," or from speculation based on the high price paid. 2 Wigmore, Evidence, §657(a) (1940 ed.).

Complaint is made of the refusal to compel the Government to turn over certain material in its files relating to Sierra. As in the case of Rinaldo's interview, see fn. 10, we can see no reason why portions of the tape recording of Sierra's interview which related to his testimony should not have been made available to defense counsel to enable them

to be satisfied, as the judge was, with respect to the accuracy of the transcripts. More important was the refusal to turn over Sierra's letter of August 29, 1960, offering his assistance to the Government "providing we can come to some kind of an agreement" and that "some thing can be done for me," and soliciting "a talk as to whether some sort of arrangements can be made to benefit the U. S. Government and myself. I am sure everyone in question will be very satisfied." The Government says this was properly refused since it did not "relate" to the subject matter as to which the witness had testified, within the meaning of the Jencks Act, 18 U. S. C. §3500, and that in any event the refusal was not prejudicial in view of rather similar statements in the transcript of Sierra's interview. We need not pass on the latter contention, but the former is surely erroneous. We can see no reason why a statement that would support impeachment for bias and interest does not "relate" to the witness' testimony as much as a statement permitting impeachment for faulty memory, *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959). If "relate" were to be limited to factual narratives, we should have to consider whether a letter merely proffering a witness' services in return for consideration was within the protection which the Jencks Act confers upon the Government; but we think the broader construction preferable and, indeed, necessary. See *Palermo* v. *United States*, 360 U. S. 343, 350 (1959). We add our wonder at the Government's willingness, not unique to this case, to imperil convictions hoped to be obtained after immense effort, by cavilling over the delivery of such a paper, whose admission would not add appreciably to the strength of the defense but whose erroneous exclusion might

lie just beyond an appellate court's power of rescue under the harmless error rule.

A few further matters in conclusion: We approve the admission of the declarations of one Renna, made in 1957 immediately after a meeting with Locascio which Rinaldo had arranged at Joe Mogavero's request, "that he [Renna] seemed to think that everything with the Canebas and Locascio was all right." There was ample evidence that Renna, as the Canebas' messenger, had joined with Locascio and the Mogaveros in the "Italian" phase of the conspiracy which was still being wound up, and the remark, in its setting, could be construed as indicating there was some thought of reviving the partnership and the Italian source of supply. On the other hand, a statement by Renna, on a chance encounter with Rinaldo in April or May, 1959, that he thought the difficulties which Joe Mogavero and Locascio had had with the Canebas had been resolved, would better have been excluded, both because of the lack of evidence that any bond with Renna still existed and because this declaration, made after Rinaldo's severance with Joe Mogavero, appears to have been narrative only. The incident with respect to the use of a prior consistent statement by Rinaldo as to the date when he began deliveries to Sedotto will hardly recur in the same form; it suffices to note that this circuit has disapproved of rehabilitation in that manner. *United States* v. *Sherman*, 171 F. 2d 619, 621-22 (1948), cert. denied *sub nom. Whelan* v. *United States*, 337 U. S. 931 (1949), but see *Baber* v. *United States*, 324 F. 2d 390, 394 (D. C. Cir. 1963), cert. denied, —— U. S. —— (1964). The Government's bills of particulars should not have been sent to the jury in the absence of any request

on its part; the accusation is that made in the indictment, and submission of bills of particulars, even if accompanied, as here, by instructions that they are not evidence, is likely to be confusing. Cf. *Pipkin* v. *United States*, 243 F. 2d 491, 494 (5 Cir. 1957).

The Court is indebted to Jerome J. Londin, Ernst H. Rosenberger, Eve M. Preminger and Harvey P. Dale, Esqs., assigned counsel, for forceful presentations in behalf of the appellants whom they represent.

Reversed for a new trial as to all defendants in a manner consistent with this opinion.

APPENDIX B

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of July, one thousand nine hundred and sixty-four.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK BORELLI, et al.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court be and it hereby is reversed for a new trial as to all defendants in a manner consistent with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX C

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1964

ROSARIO MOGAVERO,

Petitioner,

vs.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 29, 1964

/s/ ARTHUR J. GOLDBERG
Associate Justice of the Supreme Court of the United States

Dated this 24th day
of August 1964

APPENDIX D

Statutory Provisions Involved

Title 21, United States Code, Section 173:

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; feitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotics drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any nar-

cotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Title 21, United States Code, Section 174:

§174. **Same; penalty; evidence**

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 18, United States Code, Section 371:

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 3282:

§3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Appendix D—Statutes Involved

Title 18, United States Code, Section 3500:

§3500. Demands for production of statements and reports of witnesses

• • •

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

• • •

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 546

ROSARIO MOGAVERO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In its brief in opposition to the petition for a writ of certiorari herein, the Government has completely failed to meet the questions presented to this Court for review.

1. As to the Question Relating to the Element of Knowledge of Unlawful Importation.

The Government's sole argument (br., p. 5) with respect to the element of knowledge of illegal importation, is that since the conspiracy originated as one to import, as well as to sell, narcotics the presumption of petitioner's continuance in the conspiracy into the limitations period sufficed to warrant an inference of knowledge on his part "that importation continued to be one of the objects of conspiracy" in the limitations period. The basic fallacy in the Government's reasoning, however, is that there is no evidence whatever in the record to show that the con-

spiracy to import—as distinguished from the conspiracy to sell—continued into the limitations period (beyond August 15, 1957).

On the contrary, the evidence showed that the last importation from the Caneba brothers in Italy, the original source of the heroin, occurred in August 1955 (R. 452), and that the relationship with the Canebas was completely terminated in early 1956, long prior to the crucial limitations date, when, in the words of the Government's key witness, Rinaldo, a dispute "ended our operation with the Caneba brothers" and resulted in no further narcotics being obtained thereafter from Italy (R. 2480, 1343-4, 1361-2, 1374-5, 1397).

As shown in the petition herein (pp. 13-14), the Government, both at the trial and in the Court of Appeals, proceeded on the theory that any conspiracy to import had terminated prior to the limitations period and that the conspiracy within the limitations period was one to *dispose of* narcotics in violation of the *latter* portion of 21 U.S.C. § 174. The Court of Appeals clearly so treated the evidence (Pet., App. A, pp. 12a, 14a, 15a), and necessarily so. *Brolan* v. *United States*, 236 U.S. 216 (1915).

In short, the Government's contention assumes a situation in which the crime charged is a single continuing conspiracy to import narcotics illegally in violation of the first portion of 21 U.S.C. § 174. It obviously has no application to a situation such as that at bar, where petitioner has been convicted on the theory of a conspiracy to deal in narcotics in violation of the latter portion of section 174. As respects a conspiracy to deal in unlawfully imported narcotics, the requirement of section 174 is clear that there

must be proof of "knowledge of such previous, illegal importation" of the narcotics dealt in during the limitations period. See *Brolan* v. *United States, supra*, 236 U.S. at 217.

Moreover, apart from the equivocal nature of petitioner's December 1953 conversation (see Pet., pp. 20-21) and even assuming *arguendo* that such conversation could suffice as proof of knowledge in 1953 that narcotics *were to be* imported thereafter, any such knowledge was insufficient to establish the jurisdictional element requisite to conviction of petitioner under the latter portion of § 174 since that portion of the statute requires proof, by independent evidence, as of a point in time *after* the narcotics have in fact been imported (and thus while petitioner was in jail), that petitioner had knowledge that the narcotics dealt in within the limitations period *had been* previously illegally imported (see Pet., pp. 14-18).

In the case at bar there is a complete absence of competent independent evidence to show that petitioner ever obtained the requisite knowledge that narcotics, unlawfully imported after he was incarcerated in 1953, and dealt in during the limitations period (after August 15, 1957), had been so imported.

2. As to the Question Relating to the Presumption of Continuance.

The Government's conclusory unsubstantiated statement (br., p. 4) that the Court of Appeals was justified in finding the evidence sufficient to establish petitioner's continuance in the conspiracy beyond his incarceration in December 1953, avoids the issue of the rebuttal of the presumption of continuance (Pet., pp. 18-20), and begs the very

question of sufficiency here presented (Pet., pp. 20-21). The only purported evidence to support the Government's assertion that petitioner was "supervising and financing" the operation while in jail (br., p. 4) consisted of the ambiguous hearsay declarations of petitioner's brother, and the Government avoids any discussion of the crucial questions whether such hearsay declarations could serve to supply an essential element of the proof required (Pet., pp. 17-18, 21), as well as whether they could be considered by the jury on the issues of initial membership and continuance in the conspiracy before the jury had *first* determined those issues on the basis of the independent evidence adduced (Pet., pp. 22-26). The evidence in fact as to the operations even prior to petitioner's incarceration was that all decisions as to finances were made by the defendant Locascio (R. 43, 63, 66-68, 104).

3. As to the Remaining Questions.

The Government's contention (br., p. 6) that the remaining issues do not merit review at this interlocutory stage, ignores the fact that those very issues will necessarily be again presented to the Trial Court upon retrial, and review by this Court would serve the salutary purpose of avoiding the injection of error in a lengthy new trial.

The Government's assumption (br., p. 6) that the Court of Appeals "left to the trial court's discretion" the matter of use by defense counsel of the tape recordings before the jury, ignores the limitation which the Court of Appeals would allow to be imposed by the Trial Court—that there be a preliminary showing of inconsistency between the recording and the typewritten transcript (see Pet., p. 27).

CONCLUSION

For the reasons stated in the petition and in this reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED DONATI, JR.
Attorney for Petitioner